



July 19, 2001

Mr. Joe A. De Los Santos
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
Attorneys at Law
P.O. Box 160606
San Antonio, Texas 78246-0606

OR2001-3136

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149665.

The Poteet Independent School District (the "district"), which you represent, received a request for three categories of information.¹ You inform us that the district is releasing portions of the requested information; however, you claim that portions of the remaining information are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that section 552.022 of the Government Code states in relevant part that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from required disclosure, except as provided by [s]ection 552.108" or unless it is "expressly confidential under other law." Gov't Code § 552.022. The investigation report submitted as responsive to category two of the request is a completed report made for the board, and thus is subject to section 552.022(a)(1). You do not assert section 552.108, but you do assert the attorney-client privilege under section 552.107(1) and the work product privilege under section 552.111 for this report. Sections 552.107(1) and 552.111 are discretionary exceptions under the Public Information Act and, as such, do not constitute

¹The requestor seeks 1) all copies of agendas or minutes of the district's school board meetings for the years Joe N. Garza, Jr. was employed by the district, 2) a copy of a report submitted to the district's board by investigator, T. Garner, concerning Joe N. Garza, Jr., and 3) copies of any other "pertinent" documents concerning the district's employment of Joe N. Garza, Jr.

“other law” that makes information “expressly confidential.”² Thus, the district may not withhold the report under sections 552.107(1) or 552.111.

However, the attorney-client privilege also is found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the report is confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the layer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception), 592 at 8 (1991) (governmental body may waive section 552.104), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

Accordingly, in order to withhold information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

Based on your representations and our review of the submitted report, we conclude you have demonstrated the applicability of Rule 503 to this information. Therefore, the report may be withheld pursuant to the attorney-client privilege. We next address your section 552.101 claim.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, “A document evaluating the performance of a teacher or administrator is confidential.” This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a “teacher,” as that term is used in section 21.355, is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an “administrator” is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we agree that the evaluation documents contained in the information at issue are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold these documents.

The information at issue also contains an Employment Eligibility Verification, Form I-9, which you have marked. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we agree that the marked Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. We next address your section 552.102 claim.

Section 552.102(b) of the Government Code excepts from required public disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee” but the exception does not apply to “the degree obtained or the curriculum on [the] transcript[.]” Gov’t Code § 552.102(b). The information at issue contains a former district employee’s college transcripts, portions of which you assert are confidential under section 552.102(b). You inform us that the transcripts are contained in the former employee’s personnel file which the district maintains. Accordingly, we agree that the district must release to the requestor the information on the college transcripts that indicates any “degree obtained” and that discloses the individual’s “curriculum,” and that the remaining information on the individual’s college transcripts must be withheld pursuant to section 552.102(b). We have marked portions of the information, in addition to those which you have marked, which must be withheld from the requestor under section 552.102(b).

Some of the personnel records at issue are medical records, access to which is governed by the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records, which you have marked, must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Finally, the information contains a copy of a Texas driver’s license. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

The district must withhold the copy of the Texas driver's license number under section 552.130(a)(1).

In summary, the district may withhold the investigation report pursuant to the attorney-client privilege under Rule 503 of the Texas Rules of Evidence. The district must withhold the former employee's college transcript information under section 552.102(b), except for the curriculum and degree obtained, which must be released. The former employee's evaluations must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. The marked medical information may be released only in accordance with the MPA. Finally, the district must withhold the copy of the former employee's Texas driver's license under section 552.130. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

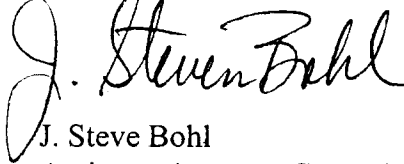
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "J. Steve Bohl". The signature is written in a cursive, flowing style.

J. Steve Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref.: ID# 149665

Enc.: Marked documents

c: Ms. Pam Kerlick, TSTA President
Kenedy Elementary School
402 FM 719
Kenedy, Texas 78119
(w/o enclosures)